No. 15917

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

R. B. FRASER, R. B. FRASER, INC., a corporation; R. B. FRASER, JR., FRASER LIVESTOCK CO., a corporation, and CHARLES FRASER, also known as CHAS. FRASER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' BRIEF

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Appeal from the United States District Court for the District of Montana

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JURISDICTION

This is an appeal from the final judgment (Tr. 108) entered on the 21st day of November, 1957, in Cause No. 15917. On the 16th day of December, 1957, the Appellants filed a notice of appeal (Tr. III). Jurisdiction of the District Court rests upon 28 U.S.C.A., Sec. 1345, 62 Stat. 933. The jurisdiction of this Court is under 28 U.S.C.A., Sec. 1291, 62 Stat. 929. The Court is hereby referred to paragraphs I, II, III and IV, (Tr. 3-5) of the Appellee's Complaint for the pleadings verifying the existence of the jurisdiction of the United States District Court for the District of Montana, Billings Division. This action was instituted by the United States in its sovereign capacity for the use and benefit of the Indians of the Crow Indian Tribe.

STATEMENT OF THE CASE

This action was dismissed as to the defendant, Charles Fraser, he having died prior to trial of the cause and it having been stipulated in the pre-trial order (Tr. 71) that the cause be dismissed as against Charles Fraser, also known as Chas. Fraser.

The Appellants' statement of the case does not contain any matters in reference to the Court's ruling on Appellee's First and Third causes of action, the Appellee having dismissed his cross-appeal on the 25th day of April, 1958.

The Plaintiff-Appellee in its sovereign capacity, instituted this action asking in the first five counts (Tr. 6-8) of its complaint for the statutory penalty of $1.00 per head for livestock trespassing upon Indian lands, the statute creating said liability being 25 U.S.C.A., Sec. 179, which reads as follows:

> "*Driving stock to feed on lands.* Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to raneg and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of $1 for each animal of such stock. This section shall not apply to Creek lands."

The sixth count (Tr. 9) contains allegations to support an injunction. The seventh (Tr. 11) and eighth counts (Tr. 13) are based on a contractual obligation contained in a grazing permit (Tr. 24) which provides as follows:

> "*Excess or deficit of the number of stock specified.* Unless the number of livestock specified in the permit is reduced by the Commissioner of Indian Affairs, the permittee will not be allowed credit or rebate in case the full number is not grazed on the area. However, if the number authorized is exceeded, without previous authority, the permittee will be required to pay, in addition to the regular charges as provided in the permit, a penalty equal to 50% thereof for such excess stock and the stock will be held until full settlement has been made."

The issues of law involved in this appeal are:

1. Were the Appellants' livestock in trespass within the provisions of 25 U.S.C., Sec. 179.

2. Is Section 25 C.F.R., Sec. 71.21, as interpreted by the Appellee, an attempt to enlarge Sec. 25 U.S.C. Sec. 179.

3. Was the Appellee a proper party plaintiff in this action?

4. Was subsection 3 of the range control stipulation, in reference to charges for exceeding the authorized limits of the permit, a penalty clause or an agreement for liquidated damages?

The testimony at the trial showed the Appellants both owned and leased land within the boundaries of the Crow Indian Reservation, interspaced and adjacent to lands both owned by Joe and Clem Cormier, herein designated as Cormier Bros. The Cormier Brothers were the permittees under leases and permits for use of range unit 22. That the deeded land, leased land and permitted land of the Cormier Bros. were in the most part, unfenced. That the land wherein the alleged trespass occurred was unfenced and adjacent to land either owned by the Appellants or on which they had a lease or permit from the Crow Indian Agency. That cattle placed on any of the lands owned, leased or permitted to the Appellants, or cattle placed upon lands owned, leased or permitted to the Cormier Bros. wherein these alleged trespasses took place, could drift and travel over the entire area herein involved. That the evidence relied on by the Appellee in support of the action for trespass, an injunction was the finding of varying numbers of the Appellants' cattle on land permitted or leased to the Cormier Bros. The evidence relied on by the Appellee in support of its seventh and eighth counts in its complaints, was the finding of an excess number of livestock on range unit 19, permitted to the Appellant, R. B. Fraser, on two separate occasions.

SPECIFICATIONS OF ERROR

1. That the District Court erred in deciding that on February 13, 1952, 82 cows owned by the Appellant, R. B. Fraser, and managed or herded by him or his agents and servants, were found in trespass upon Indian Trust lands within the Crow Indian Reservation.

2. The Court erred in holding and deciding that on or about July 8, 1955, 9 horses and 3 mules owned by the Appellants, R. B. Fraser, Inc., and R. B. Fraser Livestock Company, were found in trespass upon Indian Trust lands within the Crow Indian Reservation.

3. The Court erred in holding and deciding that on or about July 28, 1955, 8 cows and 3 calves owned by the Appellant, R. B. Fraser, and managed and herded by him or his agents or servants, were found in trespass upon Indian Trust lands within the Crow Indian Reservation.

4. The Court erred in holding and deciding that from time to time over the period from 1945 to the filing of the original action, Appellants have allowed cattle and horses to drift and graze upon the lands of the Crow Indian Reservation on which they held no valid lease or grazing permit; that the drifting and grazing of said livestock was done or permitted by the Appellants, knowingly, wilfully and without the consent of either the Indians affected thereby or the superintendent of said reservation and in defiance of the plaintiff and its officers and employees having the supervision and management of said lands.

5. The Court erred in holding and deciding that the Appellants, or their agents or servants caused or permitted livestock to drift or graze upon Indian Trust lands within the Crow Indian Reservation and upon which the Appellants had no per-

mit, lease or privilege whatever between June 12, 1945, and March 27, 1957.

6. The Court erred in holding and deciding that the Appellee is entitled to a permanent injunction against the Appellants, and each of them.

7. The Court erred in failing to hold and find that that certain regulation of the Department of the Interior of the United States, 25 C.F.R., 71.21 (b), is unreasonable and inconsistent with Sec. 25, U.S.C. 179, and thereby invalid.

8. The Court erred in finding that the United States was the proper party plaintiff and in failing to find that the lessee or permittee was the party to bring any action or injunction herein; in holding and deciding that the penalty clause under subsection 3 of the Range Control stipulation, as set forth in Plaintiff's Exhibit No. 9, was a liquidated damage clause and not a penalty clause. The Court erred in failing to dismiss the seventh and eighth counts of Appellee's Complaint.

SUMMARY OF THE ARGUMENT

1. The only element of proof shown by the evidence as to the Appellants' trespassing was the finding of the Appellants' livestock on land not permitted to them, this land being adjacent to land owned or leased by the Appellants and unfenced, and the mere fact the Appellants' livestock were found on lands not permitted or leased to them, does not constitute a trespass.

2. The interpretation of the Appellee that the finding of livestock on unfenced land held in trust by the United States for the Indian allottee, is an interpretation of of 25 C.F.R., Sec. 71-21 which exceeds the traditional interpretation given Sec. 25 U.S.C., Sec. 179, and is uncinstitutional.

3. The lands on which the livestock of the Appellants were found, were lands either leased to or permitted to the Cormier Bros. and they were the proper parties to bring the trespass or injunction action, they being the parties in legal possession of the lands and these remedies asked for in the Appellee's complaint.

4. That subsection 3 of the Range Control stipulation, being possessory remedies, which is by reference incorporated in the permit contract between Appellant, R. B. Fraser, and the Appellee, was a penalty clause, treated as such by the Appellee and designated as such by it and sued upon by the Appellee as a penalty. No proof of damages having been shown, the seventh and eighth count should have been dismissed.

ARGUMENT

In the 2nd, 3rd, 4th and 5th counts of its complaint, the Appellee seeks to recover the penalty prescribed by Title 25, U.S.C. Sec. 179, which provides as follows:

> "Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of $1 for each animal of such stock. This section shall not apply to Creek lands. (R.S. #2117; Mar. 1, 1901, c. 676, * 31 Stat. 871.)"

Supplementing the statute, the Department of Interior adopted the following regulation:

> "71.21 Trespass. The owner of any livestock grazing in trespass on any restricted Indian land, is liable to a penalty of $1 per head for each animal thereof, together with the reasonable value of the forage consumed and damages to property injured or destroyed."

"The following acts are prohibited:

(a) The grazing upon or driving across any restricted Indian lands of any livestock without an approved grazing or crossing permit, except such Indian livestock as may be exempt from permit.

(b) Allowing livestock not exempt from permit to drift and graze on restricted Indian lands without an approved permit." *(25 C.F.R. 1956 Supp. 71.21.*

The proof as submitted by the Appellee did not constitute trespass under *25 U.S.C. Sec. 179, supra,* prior to the enactment of the Department of Interior of *25 C.F.R. Sec. 71.21, supra.* In the leading case of *Light v. The United States, 220 U.S. 523, 55 L. Ed. 570, 31 S. Ct. 485,* and in *Shannon v. United States, 9 Cir., 160 F. 870, 875,* and in all other cases of alleged trespass on Government land heretofore determined, be it held in trust for Indian or public domain, the Courts have found an element of wilful and overt trespass by the defendant or have found him to have placed his livestock on land so that their natural inclination in seeking forage and water, would be to go upon the Government held lands. No such act of wilful trespass or placing of cattle so as to constitute a wilful trespass, has been proven against the defendant in the instant case. The only showing made by the Appellee was that livestock of the Appellants were found on land permitted or leased to the Cormier Bros. The evidence of the Appellee, taken in its most favorable light, shows livestock of the Appellants on range unit 22 in the latter part of January and the forepart of February, 1952. These cattle were part of a large number of cattle grazing on what was open and unfenced range land within the boundaries of the Crow Indian Reservation.

Evidence shows that the Appellants owned a considerable amount of land within range unit No. 22 and large sections of land adjacent and next to range unit No. 19 where these

claims of trespass are laid. This land, in most part, is unfenced and cattle can roam and graze from said Appellants' land and other lands thereabout, at will. The question of trespass is then narrowed down to whether or not a party who places cattle upon his own unfenced land is liable for the penalty in *Sec. 25, U.S.C., Sec. 179,* for trespass if said cattle are found upon unfenced Indian Trust land permitted or leased under a possessory right to white citizens—in this case, another large cattle operator, the Cormier Bros.

Although the rule at common law was that a landowner was not bound to fence his land against the livestock of others. *Lazarus v. Phelps, 152, U.S. 81-85, 14 S. Ct. 477, 478, 38 L. Ed. 363, Buford v. Hautz, 133 U.S. 320, 10 S. Ct. 305,* this rule has never been adopted in the United States. *Light v. The United States, 220 U.S. 523, 537, 55 L. Ed. 570, 31 S. Ct. 485.* The precise question raised here is whether that doctrine pertains when the United States as the sovereign Government, in its category as guardian of Indian Trust lands is a party to the action.

In finding the Appellants were trespassing, by the showing made here by the Appellee, was a repudiation of the position previously taken by the United States Supreme Court in *Light v. United States, supra.*

In *Light v. The United States, supra,* our Supreme Court said:

> "In this country in the progress of the settlement, the principle that a man was bound to keep his cattle confined within his grounds or else he would be liable for their trespass on the unenclosed grounds of his neighbor, was never adopted or recognized as the law of this country."

Furthermore, the evidence shows that the people for whose benefit this lawsuit was being brought was not the Indian allot-

tee, but the white lessee, in the instant case, the Cormier Bros. For these lands, whether they be leased under permit, competent or incompetent office leases, were at all times during the alleged trespasses, in possession of white lessees. The only loss due to the alleged trespass, if any, was to the Cormier Bros. and the only trespass, if any, was on lands leased and in possession of the Cormier Bros.

The evidence in this case shows that the Cormier Bros. and the Appellants have been having trouble over grass on the Crow Indian Reservation for many years and this is the first time the Indian Department, in the name of the Appellee, has seen fit or been talked into taking sides in a neighborhood squabble. On the contrary, it has always been the policy to stay out of these controversie. *LaMott v. United States, 256 Fed. 5, 254 U.S. 570.*

The sustaining of the position of the Appellee, in effect, amounts to the adoption of the English common law doctrine of fencing cattle in and means that any individual Indian or white, who either owns land within the boundaries of the Reservation or leases, or is a permittee within the confines of said boundaries, has to fence every unit of land which he possesses or he would be liable for the penalty of the above section on which this action is based. Instead of protecting the individual Indian allottee's interest in his lands, it will ultimately work to his detriment and he will be at the mercy of a few operators and land owners, if any, who can afford to fence each piece of land on which they have a permit or a lease, and, ultimately, will limit the marketability of the allottee's land.

Furthermore, in finding the defendants in trespass, under the evidence presented in this case, in effect is giving an interpretation of Section 25 U.S.C., 179, which heretofore has not

been given, or results, in effect, in allowing the Department of Interior to legislate rather than regulate. It may well be that the interpretation heretofore given Sec. 25 U.S.C. 179, supra, may not be practical due to the change in livestock operations, but is a subject for Congress to determine and to pass a law changing the established law. Neither the courts nor the Department of the Interior, through the Bureau of Indian Affairs, has that Constitutional right. Therefore, we are bound by the laws as they exist and as they have previously been interpreted by our Courts.

INJUNCTION

The Appellee's sixth cause of action is for an injunction for trespass by the Appellants within the confines of the Indian Reservation. Before the United States is entitled to an injunction, it must show that there has been a wrongful invasion of its possessory interest either in itself as owner or as representative and guardian of an Indian allottee. In the case of *LaMott v. United States, 256 Fed. 5, 254 U.S. 570, supra*, where owners of land adjacent permitted cattle to pass on into grass on unfenced Indian land where another had a valid approved lease, the Court held that the Government was without authority to maintain an injunction to restrain the grazing or trespass, stating such a trespass does not injure the fields, nor affect the Allottee Lessors. The wrong is to the Lessee alone and he has a legal remedy and he alone. The Government is not concerned in and has no authority to protect such interest.

PENALTIES—LIQUIDATED DAMAGES

The Appellee's counts seven and eight are actions for penalties under the terms of a grazing permit between the Appellee

and the Appellant, R. B. Fraser. The question as to the penalty clause which is sued on is whether or not the clause, as recited in the contract, is a penalty clause or a clause for liquidated damages. The clause itself provides as follows:

> "*Excess or deficit of the number of stock specified.* Unless the stock specified in the permit is reduced by the Commissioner of Indian Affairs, the permittee will not be allowed credit or rebate in case the full number does not graze in the area. However, if the number authorized is exceeded without previous authority, the permittee will be required to pay, in addition to the regular charges as provided in the permit, a penalty equal to 50% thereof for such excess stock and the stock will be held until a full settlement has been made."

If the above clause is a penalty clause, then the seventh and eighth counts of the Appellee's Complaint should have been dismissed for in the case of a penalty clause, the measure of the damages is the ordinary actual loss, but in the case of liquidated damages, the whole amount is recoverable. *The Illinois Surety Co. v. United States, 229 Fed. 227, 143 C.C.A. 535.*

As a general rule, unless it is clear that the parties intended otherwise, the tendency of the Court is to regard stipulations in contracts, purporting to fix in advance, the sum to be paid in the event of breach, as in the nature of a penalty rather than as liquidated damages. *15 Am. Jur. 676, Corbin on Contracts, p. 283.*

If we turn to the allegations of the complaint (Tr. 11), we can readily see what was contemplated by the Government at the time of filing the action and what was in its mind at the time of entering into the contract with the Appellants, for the terms of the contract itself set forth that a penalty was contemplated (Tr. 44).

> "And if the number authorized is exceeded without previous authority, the permittees will be required to pay, in

addition to the regular charges as provided in the permit, a penalty equal to 50% thereof for such excess stock and the stock will be held until the full settlement will be made."

Where a sum in the contract is called a penalty, the sum will be held to be such where there is nothing in the nature of the contract to show a contrary intent. *15 Am. Jur. 679.* In the instant case, it is clear that the interpretation given the contract by the parties at the time of executing same, and the interpretation given it at the time of filing the lawsuit by the Appellee herein, was a penalty. The pleadings here involved, contemplated a penalty and not a contract for liquidated damages. In order for the Government to have properly pleaded a complaint for liquidated damages, it was necessary for it to plead and prove facts that would bring it within the exceptions of Sections 13-804 and 13-805, Revised Codes of Montana, 1947, which provides as follows:

Section 13-804, Revised Codes of Montana, 1947, provides:

> "*Contracts fixing damages void.* Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."

Section 13-805, Revised Codes of Montana, 1947, provides:

> "*Exception.* The parties to a contract may agree upon an amount which shall be presumed to be an amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage,"

and was so held in *Associated Press v. Emmett, 45 Fed. Supp. 907,* and *Clifton v. Wilson, 47 Mont. 305, 312, 132 Pac. 424.* A complaint must aver the damages resulting from the alleged

breach of a contract. *Fed. Prac. and Proced., Sec. 259, Vol. 1, p. 458.* There is no allegation that it would have been impractical or extremely difficult to fix actual damages. *Stephens, et al. v. Daugherty, et al., 166 Pac. 375, 33 Cal. App. 733; Kelly v. McDonald, 276 Pac. 404, 98 Cal. App. 121; Johnson v. Cook, et al., 64 Pac. 729, 24 Wash. 474.*

The pleadings also show that a penalty was contemplated by the Appellee in that the amount asked for relief under the complaint is disproportionate to the damages sustained, for where the amount stipulated in the contract as liquidated damages for failure of performance and there is no relation to the actual damages which may be reasonably anticipated from such failure, the sum will be called a penalty. *Futrall v. Triplett, 84 Fed. 2d, 861, in re Gelmo's, Inc., 43 Fed. 2d 832, McCall v. Dupler, 174 Fed. 133, Management, Inc. v. Schassberger, 235 Pac. 2d, 293, 39 Wash. 2d, 321.*

CONCLUSION

For the foregoing reasons, it is submitted that the part of the judgment appealed from by the Appellants should be reversed.

Respectfully submitted,

KURTH, CONNER & JONES

By .....

Attorneys for the Appellants